No. 422

NOV 9 1951
CHARLES ELMORE CROP

In the Supreme Court of the United States

OCTOBER TERM, 1951

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

vs.

HISAO MURATA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

STATEMENT AS TO JURISDICTION

In the Supreme Court of the United States

Civil No. 1011

HISAO MURATA

v.

DEAN ACHESON, AS SECRETARY OF STATE

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the decision and the judgment of the District Court entered in this cause.

OPINION BELOW

The opinion of the District Court is not yet reported. A copy of the decision, which includes the findings of fact and conclusions of law, as well as the opinion, is annexed hereto as Appendix A. A copy of the final judgment is annexed hereto as Appendix B.

JURISDICTION

The decision of the District Court was entered September 12, 1951, and a final judgment was en-

tered October 11, 1951. A petition for appeal is presented to the District Court herewith, on October 11, 1951. The jurisdiction of the Supreme Court to review on direct appeal a decision or judgment holding an Act of Congress unconstitutional in a civil proceeding to which an officer of the United States is a party is conferred by 28 U.S.C. 1252 and 28 U.S.C. 2101(a). The following decisions sustain the jurisdiction of the Supreme Court to review the decision and judgment on direct appeal in this case. *Fleming* v. *Rhodes*, 331 U. S. 100; *United States* v. *Bekins*, 304 U. S. 27.

QUESTION PRESENTED

Whether Congress has the constitutional power to provide, as it has in Section 401(e) of the Nationality Act of 1940, that a person who is a national of the United States by birth shall lose his nationality by entering or serving in the armed forces of a foreign state, if he has or acquires the nationality of such foreign state.

STATUTE INVOLVED

Section 401 of the Nationality Act of October 14, 1940, c. 876, 54 Stat. 1138, 1168, 8 U.S.C. 801, provides in pertinent part as follows:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (e) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> * * * * *

STATEMENT

The plaintiff-appellee filed in the District Court for the District of Hawaii a complaint under Section 503 of the Nationality Act (8 U.S.C. 903) seeking a judgment declaring him to be a citizen of the United States. After trial, the District Court found the following facts:

Plaintiff was born in Hawaii in 1922 and was at birth a citizen of the United States and a subject of Japan. In 1940, he went to Japan to attend school. He was inducted into the Japanese Army in 1943, and was released in 1946. At the time he applied for a United States passport, he lied concerning his service in the Japanese Army, but in March 1950, told the truth about such service. His application for a passport was denied on the ground that he had lost his United States citizenship.

Referring to its decision in *Okimura* v. *Acheson*, decided the same day, the district court held that Congress had no constitutional power to divest an American born citizen of his nationality because he served in a foreign army. The district court accordingly granted plaintiff's petition that he be declared a citizen of the United States.

THE QUESTION IS SUBSTANTIAL

This cause presents the same issue as that involved in *Okimura* v. *Acheson*, decided by the same district court on the same day, except that it involves only the provisions of Section 401(*e*) of the Nationality Act of 1940 relating to military service in a foreign state, and not the additional provisions of Section 401(e) relating to voting in a political election in a foreign state. We respect-

fully refer the Court to our Statement as to Jurisdiction filed in the *Okimura* case and suggest that disposition of this case be made in the same manner as in the *Okimura* case.

Respectfully submitted,

HOWARD K. HODDICK,
United States Attorney,
Counsel for Defendant.

OCTOBER 11, 1951.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1011

HISAO MURATA, PLAINTIFF

v.

DEAN ACHESON, AS SECRETARY OF STATE, DEFENDANT

DECISION

This is a companion case, under 8 U.S.C. Section 903, to the *Okimura* case, No. 1027, also decided this day.

FINDINGS OF FACT

The following are found to be the facts:

1. Murata was born in Hawaii, United States of America, and became at birth a dual citizen—that is, he acquired United States citizenship by birth in this country and Japanese nationality under the Japanese law of blood.

2. Having been graduated from a public high school in Hawaii, in 1940, plaintiff went on a United States passport to Japan, intending to remain there a year to study, at his father's request, Japanese.

3. Shortly before the Japanese attack upon the United States at Pearl Harbor, plaintiff registered with the United States Consul at Kobe, Japan, and advised the Consul that he intended to enroll in Hosei University and to pursue a three-year course. The Consul registered plaintiff as a student, and renewed his passport for but 90 days.

4. After December 8, 1941, plaintiff quit Hosei University. In so doing he was motivated by the war, in that had he stayed in the university he would have become a non-commissioned officer in the Japanese, and also because of his displeasure of the attack made upon his relatives in Hawaii, United States of America.

5. Upon leaving the university, plaintiff lived at Yamaguchi with an uncle. His registration with the Japanese police was accordingly changed. At no time after December 8, 1941, was he ever questioned or bothered by either the military or civil police on account of his United States citizenship.

6. At least after entering Hosei University plaintiff knew of the Japanese Military Conscription law.

7. In March 1943, plaintiff got his final draft notice, was examined in April, and inducted in December, 1943. Plaintiff remained in the Japanese Army until Japan surrendered.

8. Plaintiff found life in the Japanese Army unpleasant because (a) he failed at intercepting enemy messages for the Japanese Army and so was suspect and assigned to hard labor carrying rice bags at Hankow Headquarters; and (b) he was unpopular with the officers and soldiers because he refused to be subservient and because he was known to have been born in Hawaii and to have been in the R.O.T.C. For refusing to do a corporal's washing, plaintiff was once beaten by the corporal with a boot, and almost nightly plaintiff was beaten up because of his birth in the United States.

9. Plaintiff entered the Japanese Army as a First Class Private and was discharged as a Superior Private.

10. Plaintiff did not resist induction into the Japanese Army because he feared the "Kempei" or military police, who he believed would forcibly take a draft dodger and mistreat or kill him and or his relatives. Fear of imprisonment for violation of the conscription law was secondary to fear of the military police.

11. When Japan surrendered, plaintiff went to China with his uncle, and at Shanghai applied for a United States passport.

12. Plaintiff admits that he lied to the Consul in that he told him he was in the Japanese Army but a short time rather than two and a half years. His reason for telling a lie was that he believed in error that such would facilitate his return home to see his sick father, whose only son he is, and also because he wished to get out of China before another war developed.

13. Plaintiff's passport application was denied at Shanghai due to his service in the Japanese Army.

14. Thereupon plaintiff returned to Japan, and worked as an interpreter for the British Occupation Forces.

15. In 1949 at Kobe plaintiff re-applied for a United States passport. Again he admittedly lied concerning his services in the Japanese Army. Finally in March, 1950, he decided to tell the Consul the truth. His application was denied, due to aforesaid military service, and a certificate of loss of nationality was issued (8 U.S.C. Section 901).

16. At the hearing before this Court plaintiff asserted first that he was only a United States citizen but later in tears admitted that he was also a subject of Japan.

Conclusion of Law

The plaintiff is entitled to the declaration of United States citizenship prayed for because Section 801(*e*) of Title 8, United States Code, is unconstitutional.

Opinion

For the reasons indicated in *Okimura* v. *Acheson*, No. 1027, decided this day, the petition is granted.

Dated at Honolulu, Territory of Hawaii, September 12, 1951.

(S.) J. Frank McLaughlin,
United States District Judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 1011

HISAO MURATA, PLAINTIFF

v.

DEAN ACHESON, AS SECRETARY OF STATE, DEFENDANT

JUDGMENT

The above cause having come on regularly for trial on April 24 and 25, 1951, before the Honorable J. Frank McLaughlin, Judge Presiding, without a jury, no jury having been requested, the plaintiff appearing by his attorneys, A. L. Wirin of Los Angeles, California, and Kazuro Miko of the law firm of Fong, Ming and Choy of Honolulu, and the defendant appearing by his attorney, Howard K. Hoddick, United States Attorney, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having heard the arguments of counsel and being fully advised in the premises and having heretofore filed a decision in this matter which contains findings of fact and conclusions of law on September 12, 1951, now makes and enters the following:

JUDGMENT

The plaintiff is and has been at all times herein a citizen of the United States, and is herewith adjudged to be a citizen of the United States, with all the rights and privileges thereof.

Dated at Honolulu, T. H., this eleventh day of October, 1951.

(S.) J. FRANK MCLAUGHLIN,
Judge, United States District Court.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 422

DEAN ACHESON, AS SECRETARY OF STATE,
Appellant,

vs.

HISAO MURATA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

A. L. WIRIN,
FRED OKRAND,
KATSUO MIHO,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 422

DEAN ACHESON, AS SECRETARY OF STATE,
Appellant,

vs.

HISAO MURATA,
Appellee

APPELLEE'S STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

Appellee above named, for his statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I

This Court Has Technical Jurisdiction to Hear the Appeal

Inasmuch as the trial court did decide as to the constitutionality of the statute involved (8 USC 801(e)), appellee agrees with appellant that this court may review the

judgment by direct appeal by virtue of the provisions of 28 USC 1252 and 28 USC 2101(a). Whether the case is of such nature that the jurisdiction of this court ought to be invoked is another question.

II

Probable Jurisdiction Should Not Be Noted Because the Decision Below Is Correct Both on Constitutional and Non-Constitutional Grounds

A

The applicable decisions and authorities sustain, the correctness of the lower court's ruling that native born United States citizenship, derived from the constitution cannot be taken away by Congress without the consent of the citizen.

See:

United States v. *Wong Kim Ark*, 169 U.S. 649, 703; *Dos Reiss* v. *Nicolls*, 161 F. (2d) 860, 862:

> "When Camara was born in Massachusetts in 1921, he then became an American citizen, not by gift of Congress, but by force of the Constitution of the United States (Fourteenth Amendment). United States v. Wong Kim Ark, 1898, 169 U.S. 649, 18 S. Ct. 456, 42 L. Ed. 890. . . .
>
> "It is by no means clear that Congress would have power to deprive a native-born American citizen of his nationality under the circumstances here presented. In United States v. Wong Kim Ark, supra, the court said, 169 U.S. at page 703, 18 S. Ct. at page 477, 42 L. Ed. 890: 'The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away.' By the Act of July 27, 1868, 15 Stat. 223, 8 U.S.C.A. § 800, Congress declared that 'the right of expatriation is a natural and inherent right of all people, indispensable

to the enjoyment of the rights of life, liberty, and the pursuit of happiness'. The reference, of course, is to voluntary expatriation. Mackenzie v. Hare, 1915, 239 U.S. 299, 36 S. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645, is authority for the proposition that Congress has some legislative power on the subject of nationality and loss of nationality. . . . The Citizenship Act of 1907 was held to be applicable, though the woman had never taken up a residence abroad subsequent to her marriage. As so applied, the Act was held valid. The woman had chosen to marry a foreigner in the face of a statutory provision that such marriage constituted a renunciation of American citizenship— 'a condition voluntarily entered into, with notice of the consequences.' But the opinion of the court in Mackenzie v. Hare, 239 U.S. at page 311, 36 S. Ct. at page 108, 60 L. Ed. 297, Ann. Cas. 1916E, 645, was careful to add: 'It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature.'

"From the language of § 401(e) and its legislative history, we think an interpretation which avoids this constitutional question is fully warranted."

cf. *Moser* v. *United States*, 341 U.S. 41.

Just as, even today, there is no right in a citizen to expatriate himself without the consent of the government (e.g. 8 USC 803; cf. wartime legislation to enable certain American born Japanese to expatriate themselves: 8 USC 801(i), as re-counted in *Acheson* v. *Murakami*, 176 Fed. (2d) 953, 962 (CCA 9), Finding 19),[1] so also, because

[1] Accord: *Strauks* v. *Dupont*, 3 Pet. (U. S.) 241, 245; Slaymaker, *The Right of the American Citizen to Expatriate*, 37 Am. L.R. 191, 192; Moore, *A Hundred Years of American Diplomacy*, 14 Harv. L.R. 165, 179; Duthcer, *The Right of Expatriation*, 11 Amer. L.R. 447, 474; Swift, *A System of the Laws of the State of Connecticut*. (Wyndham, Conn. 1795-96, Vol. I, p. 164); 1 Blackstone, Commentaries, 367 et seq.

citizenship is not a one-way street, but rather a two-way highway on which both the citizen and his government have reciprocal rights and obligations (*Ainslee* v. *Martin*, 9 Mass. 454, is there no right in the government, save as punishment for crime (ibid), to discharge a subject from citizenship against his consent. (ibid). Indeed, the very cases relied upon by appellant sustain this point. There was, of course, in the *Savorgnan* case (338 U.S. 491) no question as to constitutionality involved.

B

The judgment of the lower court is correct and can be sustained without the constitutional question being reached.

It is axiomatic that if a judgment of a lower court is sustainable on any ground, even though the trial court relied on a different ground, the appellate court will sustain the lower court's judgment.

Oklahoma v. *United States Civil Service Commission*, 330 U.S. 127

Aetna Casualty & S. Co. v. *Flowers*, 330 U.S. 464

cf. *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U.S. 129

It is equally axiomatic that if a case can be disposed of on a non-constitutional ground, the case will be so decided by this court and the constitutional question will not be reached.

Railroad Commission v. *Pullman Co.*, 312 U.S. 496

Arkansas Louisiana Gas Co. v. *Dept. of Public Utilities*, 304 U.S. 61

Coffman v. *Breeze Corps, Inc.*, 323 U.S. 316

Burton v. *United States*, 196 U.S. 283

cf. *Sweatt* v. *Painter*, 339 U.S. 629, 631

The decision below is amply sustainable on non-constitutional grounds, namely, that appellee did not act voluntarily, but rather under duress and coercion and therefore his citizenship cannot be held lost, regardless of the constitutionality of the statute involved.

Just as the principles suggested above, are plain, so is it equally plain that unless the citizen acted voluntarily, he will not be held to have lost his citizenship even if he physically performed the forbidden acts.

Perkins v. *Elg*, 307 U. S. 315, 334:

> "Expatriation is the *voluntary* renunciation or abandonment of nationality or allegiance." (Italics added.)

Dos Reiss v. *Nicolls*, 161 F. (2d) 860 (CCA 1):

> "Voluntary action . . . is of the essence of the right of expatriation." On re-hearing (p. 868):
>
> > "To 'expatriate' oneself clearly implies voluntary action."

Accord:

Attorney General v. *Ricketts*, 165 F. (2d) 953 (CCA 9);
Acheson v. *Murakami*, 176 F. (2d) 953 (CCA 9);
Podea v. *Acheson*, 179 F. (2d) 306 (CA 2).

Dos Reiss v. *Nicolls*, *supra*, is accepted by this Court in *Savorgnan* v. *United States*, 338 U. S. 491.

The *Savorgnan* case re-asserts the requirement that the acts resulting in loss of United States citizenship be "voluntarily done" (*Savorgnan* v. *United States*, at p. 500); that the act be "voluntarily and knowingly" done (at p. 502); and that Court specifically points out that where there is "real duress" there is no loss of United States citizenship (at p. 502, footnote 18), citing *Dos Reiss* v. *Nicolls*, 161 F. 2d 860 (C.A. 1st Cir.) supra; *Schoiler* v. *United States*, 75 F. Supp. 353 (N.D. Ill.); *In re Gogal*, 75 F. Supp. 268 (W. D. Pa.).

It was on the basis of deciding cases on non-constitutional grounds, if possible, that the *Dos Reiss* case, *supra*, was decided.

As to the appellee herein, the court below made findings of fact, not challenged by appellant here, as follows:

"4. After December 8, 1941, plaintiff quit Hosei University. In so doing he was motivated by the war, in that had he stayed in the university he would have become a non-commissioned officer in the Japanese Army, and also because of his displeasure of the attack made upon his relatives in Hawaii, United States of America."

"8. Plaintiff found life in the Japanese Army unpleasant because (a) he failed at intercepting enemy messages for the Japanese Army and so was suspect and assigned to hard labor carrying rice bags at Hankow Headquarters; and (b) he was unpopular with the officers and soldiers because he refused to be subservient and because he was known to have been born in Hawaii and to have been in the R.O.T.C. For refusing to do a corporal's washing, plaintiff was once beaten by the corporal with a boot, and almost nightly plaintiff was beaten up because of his birth in the United States."

"10. Plaintiff did not resist induction into the Japanese Army because he feared the "Kempei" or military police, who he believed would forcibly take a draft dodger and mistreat or kill him and/or his relatives. Fear of imprisonment for violation of the conscription law was secondary to fear of the military police."

Thus it is clear that appellant acted not of his own free will and consent but under such duress and coercion as have resulted in restoration to citizenship of many other young Nisei whose cases have been decided by the courts,[2] in more of which the government has taken an appeal.

[2] Some of these cases will be listed below under Point III.

Therefore, since appellee did not act voluntarily, he cannot be said to have lost his citizenship and the case should be affirmed on this ground with no need to consider the constitutional question.

III

If Probable Jurisdiction Is Noted by This Court, Full and Complete Briefs Should Be Filed and Ample Opportunity for Oral Argument Given

Appellee has pointed out above that this is not a case wherein probable jurisdiction should be noted. If, however, appellee is incorrect and probable jurisdiction is noted, it is respectfully submitted that appellant's suggestion that the case be disposed of without argument should not be followed.

The problem involved as to whether many, many hundreds of Nisei lost their citizenship during and just after the last war with Japan is of great importance. The question has been litigated in many cases in the lower courts[3]

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[3] See, for Example:
Ishikawa v. *Acheson*, 85 Fed. Supp. 1; USDC D Hawaii;
Shibata v. *Acheson*, 86 Fed. Supp. 1; USDC SD Calif.;
Kanno v. *Acheson*, 92 Fed. Supp. 183; USDC SD Calif.;
Motoyama v. *Acheson*, No. 881, USDC Hawaii (Unreported);
Komura v. *Acheson*, No. 10449, USDC SD Cal. (Unreported);
Furukawa v. *Acheson*, No. 8913, USDC SD Cal. (Unreported);
Hosoda v. *Acheson*, No. 10095, USDC SD Cal. (Unreported);
Kato v. *Acheson*, 94 Fed. Supp. 415; USDC SD Cal.;
Ozasa v. *Acheson*, 94 Fed. Supp. 436; USDC SD Cal.;
Hamamoto v. *Acheson*, 98 Fed. Supp. 904; USDC SD Cal.;
Kondo v. *Acheson*, 98 Fed. Supp. 884; USDC SD Cal. (On Appeal);
Yamamoto v. *Acheson*, 83 Fed. Supp. 346; USDC D Ariz.;
Arikawa-Tsunashima v. *Acheson*, 83 Fed. Supp. 473; DC SD Calif.;
Onye v. *Acheson*, 91 Fed. Supp. 129; DC D Hawaii;
Yonemura v. *Acheson*, No. 965; DC D Hawaii (Unreported);
Furuno v. *Acheson*, 94 Fed. Supp. 381; (DC SD Calif.);
Masuko Kai v. *Acheson*, 94 Fed. Supp. 383; (DC SD Calif.);
Seki v. *Acheson*, 94 Fed. Supp. 438; (DC SD Calif.);

and, being concerned with the precious right of citizenship, ought not be summarily treated or disposed of. If probable jurisdiction is noted, full opportunity for the filing of briefs and for oral argument should be given.

Moreover, it is to be noted that cases concerning the very statute here involved and related ones are even now on their way to this court, extensions of time within which to file petitions for writ of certiorari having been granted.[4]

WHEREFORE, appellee respectfully submits that the within appeal be dismissed or that the judgment of the District Court for the District of Hawaii be affirmed.

A. L. WIRIN,
FRED OKRAND,
KATSUO MIHO,
Counsel for Appellee.

Rokui v. *Acheson*, 94 Fed. Supp. 439; (DC SD Calif.);
George Yada v. *Acheson*, 94 Fed. Supp. 438; (DC SD Calif.);
Kawahara v. *Acheson*, 96 Fed. Supp. 38; (DC SD Calif.);
Henry Yada v. *Acheson*, No. 1008-SD; (DC SD Calif. Unreported)
Nakashima v. *Acheson*, 98 Fed. Supp. 11; (DC SD Calif.)
Ueno v. *Acheson*, 96 Fed. Supp. 510; (USDC D Wash.)
Kuniyuki v. *Acheson*, 189 F(2d) 741; on reh. 189 F(2d) 897; Now on petition for Writ of Certiorari.
Furusho v. *Acheson*, 94 Fed. Supp. 1021 (DC D Haw.)

Cf. as to elections in Germany:

Brehm v. *Acheson*, 90 Fed. Supp. 662; (DC SD Tex.)
Wohlmuth v. *Acheson*, No. 520-50 Civ. (DC DC) (On Appeal)

And there are about 50 other cases awaiting trial.

[4] *Acheson* v. *Kuniyuki*, 189 Fed. (2d) 741, on reh. 190 Fed. (2d) 897 (CA 9); *Kawakita* v. *United States*, 190 Fed. (2d) 506 (CA 9); Petition for Certiorari filed Nov. 21, 1951, No. 220 Misc.

FILED
DEC 3 1951
CHARLES ELMORE CROPLEY

Nos. 421 and 422

In the Supreme Court of the United States

OCTOBER TERM, 1951

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

v.

KIYOKUMA OKIMURA

DEAN ACHESON, AS SECRETARY OF STATE, APPELLANT

v.

HISAO MURATA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MEMORANDUM FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MEMORANDUM FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

As we pointed out in our Statement as to Jurisdiction in No. 421, the court below held categori-

cally that Congress has no power to divest a native born American citizen of his nationality except where he voluntarily acquires foreign nationality by naturalization. Appellees apparently would not go that far; they argue in their motions to dismiss or affirm that expatriation can constitutionally be imposed only with the consent of the citizen. We have answered both of these propositions in our jurisdictional statement. We there pointed out that in *Mackenzie* v. *Hare*, 239 U.S. 299, this Court rejected a contention identical with that made by appellees here and held that the voluntary performance of an act which Congress has declared shall result in the loss of American citizenship does not amount to expatriation without the concurrence of the citizen, but is "a condition voluntarily entered into, with notice of the consequences" (239 U.S. at 312). This Court has made it equally clear, both in the *Mackenzie* case and in *Savorgnan* v. *United States*, 338 U.S. 491, 497-502, that an intent not to give up native American citizenship does not relieve the citizen from the consequence of expatriation flowing from his voluntary performance of an objective act of expatriation specified by Congress. In view of these decisions and the others cited in our jurisdictional statement, there is no room for argument that expatriation requires the subjective consent of the citizen.

Appellees' reliance upon certain language in the opinion of the First Circuit in *Dos Reis ex rel.*

Camara v. *Nicolls*, 161 F. 2d 860, is misplaced. That court's doubts as to the validity of a literal application of Section 401(e) of the Nationality Act of 1940 (8 U.S.C. 801(e)) to Camara stemmed from the fact, as found by the District Court, that "His service as a draftee in the Portuguese army, with a concentration camp as the alternative, was under duress." (161 F. 2d at 862.)[1] The court held, however, that the constitutional question engendered by this finding was avoided by its interpretation of Section 401(e), based upon an exhaustive review of the legislative history, as being applicable only to voluntary service in the armed forces of a foreign state. The court did not question its validity as so construed.[2]

Appellees argue, however, that the judgments below can be sustained on the "non-constitutional" ground that their acts of expatriation were involuntary and therefore did not result in loss of their American citizenship.

We agree that if these acts were in fact and in law involuntary, appellees did not lose their citi-

[1] Appellees omit this sentence, and others, from their quotation from the opinion, thus creating the impression that the court's reference to "the circumstances here presented" related only to Camara's native birth. The portion omitted by appellees makes it clear that the court was referring to the circumstances of Camara's dual nationality and his involuntary impressment into the Portuguese army.

[2] Appellees' statement that *Dos Reis* v. *Nicolls*, *supra*, was "accepted" in *Savorgnan* v. *United States*, *supra*, is misleading. The *Dos Reis* case was cited in *Savorgnan* only as a dissimilar case involving "real duress" (338 U.S. at 502, fn. 18).

zenship. But no such conclusion is before the Court on these appeals. The District Court's findings referred to by appellees are findings of fact relating to certain circumstances to which appellees were exposed before they committed the acts in question. It might be that the trial court on the basis of these facts would conclude that the resulting acts of appellees were involuntary. But the court below made no such finding. It based its entire decision on the one conclusion of law it made, i.e., that 8 U.S.C. 801(c) and (e) are unconstitutional.

Indeed, there is language in the District Court's opinion in No. 421, which it adopted in No. 422, which, if not in and of itself sufficient to amount to a finding that appellees acted voluntarily, is at least inconsistent with a conclusion that their acts were involuntary. In discussing the sole issue it considered involved in the case, the court said:

> Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, *he served in the Japanese Army or voted in an election in Japan?* [Italics supplied.]

It is clear from this language that the court was assuming voluntary service in the Japanese Army and voluntary voting in a Japanese election.

But even more inconsistent with a conclusion that appellees' acts were involuntary is the following language of the court in the closing passages of the opinion:

> Stricter enforcement of the law of treason may well be the solution to the *problem of dual citizens such as this, who selfishly play one country against another.* [Italics supplied.]

If the court had found that appellees had been coerced into committing the acts here involved, it would be strange indeed for it to charge them with selfishly playing one country against another. In any event, such language would indicate that the court did not conclude that their actions were involuntary.

In these circumstances, we submit that it is inappropriate to ask this Court to affirm the judgments of the District Court on the ground that appellees' acts were involuntary. True, the District Court made what might be considered subsidiary findings as to voluntariness. It did not, however, make the ultimate finding on that question. It cannot be said, therefore, that the District Court's judgments are sustainable on the ground advanced by appellees. Rule 52(a) of the Federal Rules of Civil Procedure requires the District Court to make findings of fact and conclusions of law. It has been the settled practice of this Court that when a lower court fails in this duty, this Court will not search the record to find a basis for

the lower court's order, but will remand the cause for appropriate findings. *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 373; *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 213; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.) § 197.

Since the sole ground of the decision below is clearly erroneous, we reiterate our suggestion that the judgments be reversed without further argument. In view of appellees' contention, consistently with the allegations of their complaints, that their acts were involuntary, we further suggest that it would be appropriate to remand the cases for further proceedings and decision on that issue.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 421-422

DEAN ACHESON, as Secretary of State,
Appellant,
vs.
KIYOKURA OKIMURA

DEAN ACHESON, as Secretary of State,
Appellant,
vs.
HISAO MURATA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

APPELLEES' REPLY MEMORANDUM TO MEMORANDUM FOR APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM.

We dissent from the suggestion made by the Solicitor General in the Memorandum for Appellant in Opposition to Appellees' Motions to Dismiss or Affirm:

> "Since the sole ground of the decision below is clearly erroneous, we reiterate our suggestion that the judgments be reversed without further argument. . . ."

We respectfuly suggest that so important a question in the administration and enforcement of the United States Nationality Act, and its various provisions, 8 U. S. Code, Section 801, subdivisions a to j, warrants consideration by this Court, prior to judgment, a consideration which will be adequate only after thorough briefing and full oral argument of the issue.

The same issue is now directly before this Court in *Kuniyuki* v. *Acheson*, No. 492, this term, and, indirectly, in *Kawakita* v. *United States*, No. 220, Misc., this term.

Counsel for the Appellees herein are also counsel for the Petitioners in both *Kuniyuki* and *Kawakita*.

It would be appropriate, accordingly, that in the event this Court notes probable jurisdiction herein, and grants certiorari in either *Kuniyuki* or *Kawakita*, that the cases follow each other on oral argument.

In view of the fact that counsel for the Appellees herein are also counsel for the Petitioners in *Kuniyuki* and *Kawakita*, and the Appellant herein and the Respondents in *Kuniyuki* and *Kawakita* cases will all be represented by the Solicitor General, this Court may expect the avoidance of duplication of presentation both in the brief and oral argument, upon the issue as to the Constitutionality of the provisions of the Nationality Act (8 U. S. C., Sections 801(c) and (e)) held invalid in the Trial Court below.

Respectfully submitted,

A. L. Wirin & Fred Okrand.

No. 422. ACHESON, SECRETARY OF STATE, *v.* MURATA. Appeal from the United States District Court for the District of Hawaii. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court for specific findings as to the circumstances attending appellee's service in the Japanese Army and the reasonable inferences to be drawn therefrom. MR. JUSTICE BLACK is of the opinion the judgment should be affirmed. MR. JUSTICE DOUGLAS, being of the view that the findings are adequate to show that the services of appellee to Japan were rendered under the compulsion of military and other sanctions, evidenced in some instances by physical beatings, dissents to vacation and remand. *Solicitor General Perlman* and *Howard K. Hoddick* for appellant. *A. L. Wirin, Fred Okrand* and *Katsuo Miho* for appellee. Reported below: 99 F. Supp. 591.